Nos. 299 and 329

In the Supreme Court of the United States

OCTOBER TERM, 1942

JERSEY CENTRAL POWER & LIGHT COMPANY,
PETITIONER

v.

FEDERAL POWER COMMISSION

NEW JERSEY POWER & LIGHT COMPANY, PETITIONER

v.

FEDERAL POWER COMMISSION

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT

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OPINIONS BELOW

The Determination of the Federal Power Commission (R. 936–940) is reported in 30 P. U. R. (N. S.) 33. The opinion of the United States Circuit Court of Appeals for the Third Circuit (R. 1113–1134) is reported in 129 F. (2d) 183.

JURISDICTION

The judgments of the United States Circuit Court of Appeals for the Third Circuit were entered on May 25, 1942 (R. 1135–1136). The petition for a writ of certiorari was filed in No. 299 on August 13, 1942, and in No. 329 on August 22, 1942. The petitions were granted on October 12, 1942 (R. 1137). The jurisdiction of this Court rests upon Section 313 (b) of the Federal Power Act and Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

Petitioner New Jersey Power & Light Company is a "public utility" within the meaning of Section 201 (e) of the Federal Power Act. Petitioner Jersey Central Power & Light Company owns and operates transmission facilities in New Jersey which extend to and interconnect with transmission facilities of the Public Service Electric and Gas Company. The transmission facilities of the Public Service Electric and Gas Company in turn extend to the mid-channel of a navigable body of water separating the State of New Jersey from Staten Island, New York, and there interconnect with transmission facilities of Staten Island Edison Corporation which extend to Staten Island, New York. Jersey Central Power & Light Company sells electric energy to Public Service Electric and Gas Company, which sells electric energy across the state line to Staten

Island Edison Corporation. Electric energy generated at the plant of Jersey Central Power & Light Company is transmitted through these interconnected facilities and is consumed in the State of New York. Electric energy also is transmitted in the reverse direction over these facilities. The questions are:

1. Does petitioner Jersey Central Power & Light Company own or operate facilities for the transmission of electric energy in interstate commerce within the meaning of Section 201 (b) of the Federal Power Act, so that it is a "public utility" as defined in Section 201 (e) of the Act?

2. If so, has petitioner New Jersey Power & Light Company, admittedly a "public utility," failed to comply with Section 203 (a) of that Act by acquiring common stock of Jersey Central Power & Light Company without prior authorization of the Federal Power Commission, when a state regulatory commission had approved transfer of such stock?

STATUTES INVOLVED

The relevant portions of the statutes involved are set forth in the Appendix, *infra*, pp. 48–53.

STATEMENT

On June 7, 1938, the Federal Power Commission issued an order (R. 1–2) directing petitioner New Jersey Power & Light Company (hereafter called Jersey Power) to submit in writing under

oath detailed information concerning its acquisition of 341,350 shares of common stock of petitioner Jersey Central Power & Light Company (hereafter called Jersey Central) in apparent violation of Section 203 (a) of the Federal Power Act and to show cause, if any, why the Commission should not proceed to enforce the provisions of the Federal Power Act. In its answer (R. 3–8) Jersey Power admitted the acquisition of the stock, but alleged that the stock was acquired with the approval of the Board of Public Utility Commissioners of the State of New Jersey, and denied the applicability of Section 203 (a) on the ground that Jersey Central was not a "public utility" within the meaning of the Act since it did not own or operate any facilities for the transmission or sale of electric energy in interstate commerce. On July 5, 1938, the Commission issued an order instituting an investigation and setting a date for a hearing (R. 9–11). On September 27, 1938, Jersey Central, which alleged that it was not a public utility within the meaning of the Act (R. 15–18), was permitted to intervene (R. 19). Thereafter extensive hearings were held before an examiner.

The material facts developed at the hearing may be summarized as follows:

Jersey Power and Jersey Central own and operate electric systems in the State of New Jersey (R. 35, 58, 1114). These two companies together

with Public Service Electric and Gas Company (hereafter called Public Service) serve territories comprising approximately two-thirds of the State of New Jersey. Both Jersey Power and Public Service admittedly are "public utilities" within the meaning of Section 201 (e) of the Federal Power Act. The electric facilities of these three companies are interconnected and are operated in parallel or synchronism (R. 86–87).[1] Jersey Central owns and operates transmission facilities extending from its generating plant in South Amboy, New Jersey, to the south bank of the Raritan River; thence such transmission facilities continue, under the ownership and operation of Public Service, to Public Service's Mechanic Street substation in Perth Amboy, New Jersey (R. 101, 125, 126, 133, 286, 516). Public Service also owns transmission facilities extending from its Mechanic Street substation to the midchannel of Kill van Kull, a navigable body of water separating the State of New Jersey from Staten Island, New York (R. 348, 101). At midchannel, Public

[1] In addition, these three utilities are interconnected and operate in synchronism with numerous other electric utilities in the States of New York, Pennsylvania, Delaware, and Maryland (R. 86). Synchronism implies not only identical speeds of generators but coincident pulsation of the electric voltage and power (R. 537). Electric utilities, when interconnected, must operate in parallel or synchronism which means that the electrical tie between each and every generator in such an interconnected system is as definite and real as though they were mechanically interconnected by shafting and gears (R. 86–87).

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Service's transmission facilities are interconnected with the transmission facilities of the Staten Island Edison Corporation (hereafter called Staten Island) whose facilities extend from such point of connection to its Atlantic substation on Staten Island, New York (R. 348, 101). The transmission facilities between Jersey Central and Public Service and the transmission facilities from Public Service to Staten Island are attached to the bus[2] at Public Service's Mechanic Street substation which serves as the common point of connection for the three utilities (R. 125, 516–517).

A contract between Jersey Central and Public Service, designated as an "Interconnection Agreement", provides for the interchange of electric energy and the maintenance of the facilities between South Amboy and the Mechanic Street substation (R. 1039–1050). Although this contract provides primarily for the transfer of emergency power to be supplied in the "event of breakdown of equipment, unusual load demands, or other unusual or abnormal condition in the system of either party * * *" it also provides that the facilities may be used, by mutual agreement of the parties, for purposes other than those specifically

[2] A bus conductor, or a group of conductors, is a switchgear assembly which serves as a common connection for three or more circuits. *American Standard Definitions of Electrical Terms*, published by American Institute of Electrical Engineers, p. 97.

provided in the contract (R. 1042). Accordingly, the facilities are used extensively, pursuant to oral arrangement, for the transfer of electric energy which petitioners' witnesses referred to as "economy-flow" energy.[3] During the period January 1, 1937, to March 31, 1938, more than 65,000,000 kilowatt-hours of electric energy were sold and transmitted under this oral contract by Jersey Central to Public Service (R. 1019).[4] The actual

[3] As was pointed out by the court below (R. 1116–1117), all electric energy is the same and will perform the same work (R. 325–326); the name "economy flow" merely denotes attendant circumstances of supply and price (R. 238–240, 259, 263–264, 328–339, 406, 429).

[4] Petitioners (Br. 13–14) seek to belittle the importance of the flow of electric energy between Jersey Central and Public Service. Actually, the record shows that Jersey Central has invested in generating capacity in excess of that required to serve its own loads (R. 40, 330), and deliveries to Public Service are an important outlet for such excess (R. 88). While Public Service has sufficient generating capacity to carry its own loads, the relative efficiency of some of that capacity makes it financially advantageous for it to purchase energy from Jersey Central (R. 249–250). As Public Service actually operates, it relies upon Jersey Central energy in its day-to-day operations (R. 238, 259, 1019–1035). It actually uses Jersey Central power to help carry its peak loads (R. 88, 180–181, 186–187). The interdependence of the interconnected utilities is established by the 1937 annual report of Public Service to the Federal Power Commission. This report shows that the 1937 annual system peak load of Public Service amounting to 551,900 kilowatts (kw.) was supplied as follows: 471,000 kw. by Public Service power plants, 32,000 kw. by Philadelphia Electric, 33,000 kw. by Pennsylvania Power & Light Company, 9,000 kw. by Jersey Central from its South Amboy plant, 2,000 kw. by Staten Island, and 5,000 kw. by other utilities (R. 96–97).

interchange of electric energy, expressed in kilowatt-hours (KWH), for the years 1934–1937 was (R. 978):[5]

	1934	1935	1936	1937
From Jersey Central to Public Service	56,345,000	79,333,106	70,694,825	55,421,000
From Public Service to Jersey Central	1,554,020	969,776	1,240,515	1,631,160

Electric energy was, in turn, interchanged between Staten Island and Public Service pursuant to contract (R. 1068–1069). The interconnection and exchange between Public Service and Staten Island was vital to Staten Island (R. 67, 73–75, 314–315, 397–401, 401–402, 407–409) which had no spinning reserve for the maintenance of service in the event of a break-down of one of its operating generators (R. 247, 395–397, 399).[6] The Jersey Central connection was relied upon as making the Staten Island interconnection with Public Service

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[5] Public Service paid Jersey Central for the electric energy which it received during 1937 the gross sum of $145,789.00 (R. 333).

[6] Staten Island's ordinary mode of operating is dependent upon the use of the interconnection. On the infrequent occasions when it could not rely on such use, due to cable failures, it was necessary for Staten Island to start and operate its less efficient (R. 247) 10,000 and 6,000 kw. generating units, which are ordinarily kept idle or "cold". (R. 406–407). Those units were installed in 1916 and 1920, respectively (R. 67). It takes a half or three-quarters of an hour to start them (R. 370), which makes the availability of the interconnection "very important" to the operation of Staten Island (R. 409).

Its importance is also shown by Staten Island's daily use of energy received from Public Service to help carry its peak hour loads (R. 324). The record of energy flows reveals that Staten Island was in fact,

more dependable (R. 67, 402).[7] Although the interchange of energy between Public Service and Staten Island nearly balanced each year, the energy "in" and the energy "out" of Staten Island are separate transactions (R. 362, 418, 429) and the energy is paid for partly in kind (R. 1013–1017) and partly in cash (R. 1074). For the years 1934–1937 the interchange expressed in kilowatt-hours was (R. 978):

	1934	1935	1936	1937
From Public Service to Staten Island	3,828,100	3,453,500	3,280,000	3,093,400
From Staten Island to Public Service	5,033,800	3,147,300	3,111,400	3,119,200

Log sheets maintained at Public Service's Mechanic Street substation show that energy so

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if not as a matter of contract, dependent on Public Service (R. 240–243). This dependence was not merely for "emergency power" or for "economy power," so-called, for it appeared that although Staten Island was theoretically required, while taking "economy power," to maintain an equivalent generating capacity spinning (R. 445), it was nonetheless the practice of the companies to agree on a price for power to Staten Island at the "economy power" rate, although it involved shutting down Staten Island's generating unit instead of keeping it spinning (R. 457).

[7] A Commission engineering witness testified that since Public Service was under obligation to furnish 25,000 kw. to Staten Island on demand it would not, in his opinion, while under this obligation, shut down its Perth Amboy plant, as it has, without having the Jersey Central connection (R. 263–264). Petitioners did not offer contradictory evidence. Commission engineers testified that emergency and other sudden demands by Staten Island on Public Service were instantaneously reflected in Jersey Central's generation (R. 707–708, 775–776, 802–804).

transmitted from Public Service to Staten Island is energy supplied by Jersey Central. Readings of all meters at the Mechanic Street substation are taken every half hour from 6 A. M. until midnight and hourly from midnight to 6 A. M., and are regularly recorded on the station log sheets. (R. 106–107; 135–137.) Commission engineers, who are experts in this field, made an analysis of 184 readings for various hours of the day and various times of the year during which there was an outflow of energy to Staten Island simultaneously with an inflow of energy from petitioner Jersey Central to the Mechanic Street substation (Comm'n's Exs. 11, 12, R. 983–1001). These readings represent energy transactions during 131 days between January 26, 1937, and September 6, 1938 (R. 135–139, 992–1001). They show that the energy being transmitted by Jersey Central to Public Service's Mechanic Street substation exceeded the total local requirements of Public Service plus the Staten Island load as registered at the substation (Ex. 12, R. 992–1001).

To determine conclusively the out-of-State destination of energy generated by Jersey Central at such times, 24 of the 184 readings, picked at random as representing typical conditions (R. 122–123), were further analyzed. This analysis established the percentage of energy supplied to Staten Island which originated on the Jersey Cen-

tral system (Comm'n's Ex. 16A, R. 1004) and showed that electric energy generated by Jersey Central was flowing out over all bus connections at Mechanic Street substation except the connection with Jersey Central from which energy was flowing into the substation (R. 118, 120–122, 124–125). Detailed study of the 24 readings demonstrated that at all times shown by the 184 readings Jersey Central was supplying all, or practically all, the energy transmitted from Public Service to Staten Island. R. 1004, 108, 112, 122, 125–126, 992–1001.)

Similarly Commission experts studied various readings at Mechanic Street substation on 38 different days between January 13, 1937, and August 12, 1938 (R. 1005–1011) when energy was flowing in the reverse direction (R. 126, 129). These studies demonstrated that the interconnected pool operations of Staten Island, Public Service, and Jersey Central resulted at times in the transmission of electric energy generated by Staten Island in the State of New York through Public Service to Jersey Central (R. 129–133). This transmission of electric energy followed the same pathway as Jersey Central generated energy transmitted to Staten Island (R. 133).

On the basis of the foregoing evidence, the Commission found that the transmission facilities connecting the substation adjoining the plant of

Jersey Central and the Atlantic station of Staten Island provide a direct and interconnected line for the flow of electric energy (R. 939); that electric energy generated by Jersey Central in New Jersey was transmitted over these facilities and consumed in the State of New York and electric energy generated by Staten Island in the State of New York was transmitted over these facilities and consumed in the State of New Jersey (R. 939), and that the part of these facilities owned and operated by Jersey Central, connecting its substation adjacent to its generating plant in South Amboy, New Jersey, to the south bank of the Raritan River are transmission facilities used for the transmission of electric energy which is transmitted from one state and consumed outside thereof (R. 939–940). It concluded that Jersey Central owns and operates transmission facilities for the transmission of electric energy in interstate commerce, that it was a public utility within the meaning of Section 203 (a) of the Federal Power Act, and that Jersey Power had acquired the stock of Jersey Central in violation of Section 203 (a) of the Act since it had not obtained prior authorization from the Commission (R. 939–940). Petitions for rehearings filed with the Commission were denied on September 15, 1939 (R. 963–964). On petitions to the court below for review, the Determination of the Commission was affirmed (R. 1135).

SUMMARY OF ARGUMENT

Petitioners contend that Jersey Power has not violated Section 203 (a) of the Act because Jersey Central is not a public utility as defined in Section 201 of the Act, and that even if it were, the Federal Power Commission cannot regulate the acquisition of Jersey Central's stock by Jersey Power, because such acquisition was approved by the New Jersey Commission. We submit that these contentions are without merit.

1. Jersey Central is a public utility within the definitions of Section 201 of Part II of the Act. Section 201 provides that a public utility is "any person who owns or operates facilities subject to the jurisdiction of the Commission" under Part II; that the Commission has jurisdiction over *all* facilities for "the transmission of electric energy in interstate commerce"; and that transmission in interstate commerce occurs if electric energy is transmitted from one state "and consumed at any point outside thereof." Electric energy generated at Jersey Central's South Amboy plant passes thence over facilities belonging to it and is consumed in New York. Moreover such transmission facilities of Jersey Central are also used for the transmission in the reverse direction of electric energy generated in New York and consumed in New Jersey. Jersey Central accordingly is a "public utility" as defined by the Act.

There is nothing in Section 201 (b) of the Act which deprives the Commission of jurisdiction

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over these facilities. That part of the section which, petitioners contend, withholds from the Commission jurisdiction over facilities used "only for the transmission of electric energy in intrastate commerce," has no application in this case because the facilities here involved are used for interstate as well as intrastate transmission of electric energy. Neither is it necessary to determine whether there is here a "sale of electric energy at wholesale in interstate commerce," since under the terms of the Act the jurisdiction of the Commission may rest either upon transmission or upon sale. Jurisdiction is here predicated upon ownership and operation of facilities for transmission of electric energy in interstate commerce.

The declaration of policy, in the context of the Act as a whole and its legislative history, confirms the conclusion that Jersey Central is a "public utility" within the Act. The interpretation of the statutory definitions for which petitioners contend would rob the Act of vitality and render meaningless a large number provisions in respect of which jurisdiction is expressly conferred upon the Commission. Moreover, notwithstanding any contention that regulation by the Commission is not to extend to particular matters subject to state regulation, the legislative history and the declaration by no means indicate that the concept of "public utility" under the Act was meant to depend on the existence or nonexistence of some state regulation.

The pertinent decisions of this Court support the conclusion of the Commission and the court below that the transmission here involved was in interstate commerce. The cases relied upon by petitioners involved an interruption of the transportation—a fact not here present—and accordingly are not in point. Owing to the nature of the transmission of electric energy, its flow is not only continuous, but virtually instantaneous. If an "interstate intent" is essential, it is met by the fact that officials of Jersey Central either knew or should have known that because of the interconnections which existed interstate transmission was bound to occur. Even under this requirement, intent of the party who initiates the transportation is not necessary; it is enough that such intent exists on the part of any participant in the transaction.

2. Jersey Power has violated Section 203 (a) by acquiring stock of Jersey Central without the prior authorization of the Commission. Petitioners admit that Jersey Power acquired stock of Jersey Central without such authorization and do not deny that such stock is a security within the meaning of Section 203 (a). Inasmuch as both companies were public utilities as defined by the Act it is clear that the Commission correctly decided that Jersey Power had violated the Act.

For the reasons already stated, declarations of policy and legislative history may not be invoked to override the unambiguous language of the Act.

Section 203 (a) within itself provides the degree of deference to be extended to state regulatory authorities and discloses clearly the congressional intent as to the method by which the declaration of policy in Section 201 (a) is to be carried into effect. This is made clear by consideration of Section 204 (f) of the Act, which withholds from Commission regulation issuance of securities and assumption of liability by any public utility which is organized and operating in a state under the laws of which its security issues are regulated by a state commission. No such clause appears in Section 203.

There is no conflict between the Commission and the Board of Public Utility Commissioners of New Jersey. The New Jersey statute operates upon the seller or the company whose stock is acquired and not upon the buyer. The federal act, on the contrary, operates upon the purchaser alone. The two acts are thus complementary. Both statutes confer administrative power to permit, not to compel. Accordingly, they do not present a situation in which one regulatory body directs the acquisition of stock and the other forbids it. Finally, the Federal Power Commission has not forbidden the acquisition of the stock. It has merely held that Jersey Power has violated the Act by acquiring the stock without obtaining its permission. It may well be that such permission ultimately would be granted if applied for. In any event a future conflict is not to be presumed.

ARGUMENT

Both petitioners contend here, as below, that Jersey Central does not transmit electric energy in interstate commerce within the meaning of the Act and that accordingly it does not own or operate any facilities subject to the jurisdiction of the Commission. From this, petitioners urge that Jersey Central is not a "public utility" within the meaning of the Act and hence the acquisition of stock of Jersey Central by Jersey Power did not come within Section 203 (a). Petitioners further urge that, because the Board of Public Service Commissioners of New Jersey approved the transfer of the stock, the Commission could not act in the premises because jurisdiction was withheld from the Commission to the extent that it was exercised by state utility commissions. We submit the court below correctly rejected these contentions.

I

Jersey Central is a "public utility" as defined by the Federal Power Act

As stated above, *supra*, p. 5, Jersey Central owns and operates part of the facilities for the transmission of electric energy from its generating plant at South Amboy, N. J., to a bus in the Mechanic Street substation of Public Service. From the bus, transmission facilities of Public Service extend to mid-channel of a navigable body of water which separates New Jersey from Staten

Island, New York. At mid-channel, Public Service's facilities interconnect with those of the Staten Island Company, which extend to the latter's Atlantic substation on Staten Island, New York. The switches connecting these various transmission facilities are kept closed and as a result electric energy generated by Jersey Central at its South Amboy plant in New Jersey passes over these interconnected facilities and is consumed in New York, while to a lesser degree, electric energy, generated in New York, passes over these same facilities to Jersey Central and is consumed in New Jersey. These facts were found by the Commission, are supported by substantial evidence, and are not disputed by the petitioners.[*] Accordingly, the sole question is whether under these facts Jersey Central is a "public utility" as defined by the Act.

1. Under the plain language of the Act Jersey Central is a public utility

Section 201 (e) of the Act defines a "public utility" as "any person who owns or operates facilities subject to the jurisdiction of the Commission." Section 201 (b) provides that the Act "shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce." It

[*] The findings of the Commission as to facts, if supported by substantial evidence, are conclusive. Section 313 (b) of the Act.

further provides that "the Commission shall have jurisdiction over all facilities for such transmission or sale of electric energy * * *." Section 201 (c) provides that for the purpose of the Act "electric energy shall be held to be transmitted in interstate commerce if transmitted from a State and consumed at any point outside thereof; but only insofar as such transmission takes place within the United States."

It is admitted by petitioners that electric energy generated by Jersey Central at its South Amboy plant on occasions moves over facilities of Jersey Central and Public Service to the Atlantic Station of the Staten Island Company and is consumed in New York.[9] Such energy clearly is transmitted in interstate commerce within the language of Section 201 (c) of the Act. This electric energy which originated at the South Amboy plant passes over transmission facilities owned and operated by Jersey Central, between its South Amboy plant and the point at the south bank of the Raritan River where they join those of Public Service. Those facilities[10] of Jersey

[9] The Commission found that electric energy was transmitted almost daily throughout 1936, 1937, and to September 1938, over these facilities (R. 939). Such frequent movement of electric energy may not properly be characterized by such terms as an "escape" or "leak" as petitioners seek to do.

[10] "It should be noted that the word 'facilities' is generally regarded as a widely inclusive term, embracing anything which aids or makes easier the performance of the activities

Central are therefore used for the transmission of electric energy in interstate commerce,[11] and under Section 201 (b) of the Act are subject to the Commission's jurisdiction.

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involved in the business of a person or corporation." *Hartford Electric Light Company* v. *Federal Power Commission* (C. C. A. 2), decided November 25, 1942. In that case the court unanimously held that the term included items used in connection with interstate sales, viz. corporate accounts, records, selling organization, etc. In the case at bar, where transmission facilities are owned and operated by the company, no similarly broad question of the scope of the term is presented.

[11] Petitioners apparently contend that Jersey Central's facilities in question are facilities for intrastate transmission of the electric energy which is transmitted from New Jersey and consumed on Staten Island (Pet. Br. 67), and that the facilities over which the energy passes do not become facilities for transmission in interstate commerce until the bus bar in the Mechanic Street substation of Public Service is reached (Pet. Br. 68). But these contentions conflict with Section 201 (c) of the Act, which requires that electric energy "be held to be transmitted in interstate commerce if transmitted from a State and consumed at any point outside thereof."

Transmission not embraced within this definition—"intrastate transmission"—must therefore be distinguished from "interstate transmission" as not involving electric energy transmitted from a State and consumed outside thereof. The very nature of electric energy makes impossible the classing of Jersey Central's transmission facilities here involved as other than "interstate." When the demand exists in Staten Island and the circuit is closed (as it was at all times), energy generated at the South Amboy plant of Staten Island, is automatically transmitted from New Jersey to Staten Island. It necessarily follows that no transmission of electric energy generated in New Jersey, transmitted therefrom and consumed in New York, can properly be intrastate either in its entirety or as to any one of its differently owned links. Unless Jersey Central's facilities in

At other times, electric energy generated by Staten Island in New York passes over the same facilities of Jersey Central and is consumed in New Jersey. That also constitutes transmission of electric energy in interstate commerce. *Illinois Natural Gas Co.* v. *Central Illinois Public Service Co.*, 314 U. S. 498. This use in itself would make these facilities subject to the jurisdiction of the Commission.

It accordingly follows that Jersey Central is a public utility as defined by Section 201 (e) of the

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question are for the generation, or the local distribution of energy (which is not contended), they are facilities for the transmission thereof in interstate commerce. As this Court has recognized, transmission of electric energy in interstate commerce is an unbroken chain from the point where generation is complete (*Utah Power & Light Co.* v. *Pfost*, 286 U. S. 165, 181) to the point where local distribution begins (*East Ohio Gas Co.* v. *Tax Commission*, 283 U. S. 465, 470–471), admitting and requiring national regulation (*Public Utilities Commission* v. *Attleboro Steam & Electric Co.*, 273 U. S. 83, 89). It is therefore clear that the Commission did not, by treating Jersey Central's facilities in question as facilities for transmission of electric energy in interstate commerce, fly "in the face of the fact" that Congress eliminated from the Commission's jurisdiction "connected" facilities, as petitioners contend (Br. 48). The very excerpts from the hearings quoted by Petitioners show, in the language used both by the Committee Chairman and by Mr. John E. Benton, General Solicitor of the National Association of Railroad & Utilities Commissioners, that the common understanding revolved about the distinction between "intrastate electric energy" (Pet. Br. 47) and "interstate power," i. e., energy (Pet. Br. 51). Not the slightest indication of intention can be discovered, in the Act or its legislative history, to recognize or treat with an intrastate transmission link in the flow of electric energy from one State to another.

Act because it owns and operates transmission facilities subject to the Commission's jurisdiction.

No argument to the contrary can properly be rested on the last clause of Section 201 (b), which provides that the Commission "shall not have jurisdiction, except as specifically provided in this Part and the Part next following, over facilities used for the generation of electric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce."[12] Section 201 (b) specifically vests the Commission with jurisdiction over *all* facilities for the transmission of electric energy in interstate commerce; it does not require that such facilities be used *exclusively* for such interstate transmission. And while the Commission under Section 201 (b) may not have jurisdiction over the generation, distribution, and exclusively intrastate transmission facilities of a "public utility" except as specifically provided in the Act, any person who owns or operates facilities for interstate transmission of electric energy is, under Section 201 (e), a "public utility" subject to the jurisdiction of the Commission.[13]

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[12] This clause is "a negatively worded confirmation of the Commission's jurisdiction, in certain circumstances, over the facilities mentioned" therein. *Hartford Electric Light Company* v. *Federal Power Commission*, C. C. A. 2d, *supra*, note 10.

[13] This is true notwithstanding the fact such person also owns or operates facilities for generation, local distribution, or intrastate transmission.

Petitioners' contention to the contrary, that the admixture of intrastate transmission with interstate transmission over the same facilities deprives the Commission of jurisdiction over such facilities and over the interstate transmission for which they are used, would emasculate the Act and is clearly erroneous. *Spokane & Inland R. R. v. United States*, 241 U. S. 344, 349–350; *Piedmont & Northern Ry.* v. *Commission*, 286 U. S. 299, 311–312; *Hartford Electric Light Company* v. *Federal Power Commission, supra*, note 10.

Nor is there any merit to petitioners' contention that Jersey Central is not subject to the jurisdiction of the Commission because it does not sell electric energy directly to Staten Island. The jurisdiction conferred on the Commission arises from either of two sources—the ownership or operation of facilities (1) for the transmission of electric energy in interstate commerce, or (2) for the sale of electric energy at wholesale in interstate commerce.[14] It is enough that the Commission finds that facilities are owned or operated for either purpose. Here, after extended hearings and consideration of substantial evidence, the Commission has found that the facili-

[14] "Section 201 (b) confers jurisdiction over not only facilities (1) for interstate *transmission* but also—and *disjunctively*—over facilities (2) for interstate wholesale *sales*." *Hartford Electric Light Company* v. *Federal Power Commission, supra*, note 10.

ties were used for the transmission of electric energy in interstate commerce. Cf. *Gray* v. *Powell*, 314 U. S. 402, 413; *Rochester Telephone Corp.* v. *United States*, 307 U. S. 125, 146. Whether Jersey Central also sells at wholesale in interstate commerce is not in issue and need not here be considered.[18]

2. The Act as a whole and its legislative history confirm the applicability of the definition to Jersey Central

It is our position that the plain statutory language of the definition is to be applied according to its tenor. We submit, however, that the declaration of policy, in the context of the Act as a

[18] Petitioners stress the fact that the court below said "It is, of course, beyond dispute that Jersey Central itself sells no electricity directly in interstate commerce" (R. 1128). It is to be noted that the question of whether Jersey Central owns or operates facilities for the sale of electric energy at wholesale in interstate commerce was not before the court inasmuch as the Commission's order was not based upon any finding to that effect. Moreover, the statement of the court below merely went to the question of a "direct" sale by Jersey Central to Staten Island. As to whether the transaction constituted a sale in interstate commerce, it observed: "Once electricity flowed from the Jersey Central generating plant to the Staten Island Company, commercial transactions between the three companies under their respective contractual relations and arrangements followed. This was interstate commerce within the meaning of the Commerce Clause" R. 1133). Contrary to the implication of petitioner's brief (p. 34) the Commission did not concede in the court below, and does not concede, that Jersey Central's sales of energy which is consumed in New York are not sales in interstate commerce.

whole and its legislative history, confirms the conclusion that Jersey Central is a "public utility" within the Act.

(a) Petitioners contend that Section 201 (a) of the Act, which recites that the Federal regulation referred to therein is "to extend only to those matters which are not subject to regulation by the States," limits all subsequent parts of the Act including Section 201 (b) describing facilities subject to the Commission's jurisdiction and Section 201 (e) defining "public utility." But Section 201 (a) is not phrased as a positive enactment; rather it is a general declaration of policy. Nor do we understand petitioners to contend otherwise. But petitioner's interpretation gives undue weight to the preamble. *Hartford Electric Light Company* v. *Federal Power Commission, supra,* note 10. While averments or preambles of this character unquestionably may be invoked to resolve an ambiguity (*Coosaw Mining Co.* v. *South Carolina,* 144 U. S. 550, 563; *Beard* v. *Rowan,* 9 Pet. 301, 317), they will not prevail against plain language in the enacting clauses of the statute (*Yazoo Railroad Co.* v. *Thomas,* 132 U. S. 174, 188; *Alexander* v. *Alexandria,* 5 Cranch 1, 9–10). The reason for the rule, of course, is clear. While the preamble explains the general purpose which the Act is intended to achieve, the enacting clauses set forth the manner in which the legislative body proposes to achieve that result. If

the language of the preamble were to prevail over the enacting clauses, it would result in the substitution of judicial theories of effectuating a generally enunciated purpose for the legislative scheme specified by Congress.

Indeed, any treatment of the last clause in Section 201 (a) as affirmatively qualifying the "public utility" definition is in the teeth of specific language in other sections recognizing Commission jurisdiction over "public utilities" subject to state regulation. For example, Section 209 (b) provides that the Commission may confer with any state commission "regarding the relationship between rate structures, costs, accounts, charges, practices, classifications, and regulations of public utilities subject to the jurisdiction of such State commissions and of the Commission * * *." Section 301 (a) discloses that public utilities which are subject to the Commission's accounting requirements will necessarily include utilities also subject to state accounting requirements. Where Congress desired to withhold jurisdiction from the Commission because of the existence of state regulation over the same matter, it had no difficulty in so providing by apposite language, as appears from Section 204 (f) which withholds from the Commission jurisdiction in respect of securities whose issuance is subject to state regulation where the issuer is organized and operating in that state. Under the conten-

tion of petitioners, exempting from the act all matters conceivably subject to state regulation, many important provisions of the Act would be rendered meaningless. For such a construction would leave in effect only the provisions providing for regulation of the transmission and sale of electric energy in interstate commerce, which was beyond the power of the states under *Public Utilities Commission* v. *Attleboro Steam & Electric Co.*, 273 U. S. 83. (Cf. *Illinois Natural Gas Co.* v. *Central Illinois Public Service Co.*, 314 U. S. 498; *Missouri* v. *Kansas Gas Co.*, 265 U. S. 298.) Certain parts of the Act having a distinct relationship to such regulations, as well as a substantial general importance, would become utterly meaningless because dealing with matters as to which state bodies unquestionably exercise some jurisdiction: the requirements as to keeping records, making reports, and adopting prescribed accounting procedures (Sections 301, 304); the prohibition against unapproved mergers, consolidations, or disposition of facilities (Section 203); prohibition against unapproved interlocking directorates; and the like. These considerations render untenable the interpretation for which petitioners contend.

But in any event, the question whether Jersey Central is a "public utility" as defined by Section 201 (b), (c), and (e) of the Act does not involve the declaration of policy in Section 201 (a).

The determination that Jersey Central falls within the Act's definition of a "public utility," is not, of itself, regulation. It merely decides that Jersey Central belongs to a class which is subject to regulation under the subsequent sections of the statute, in the circumstances there prescribed. In this case no act of Jersey Central is sought to be regulated by the Commission. The declaration of policy in the Act if otherwise applicable might be of moment when a particular regulation is questioned, but it can hardly merit serious consideration *in limine* when the sole question is whether an electric utility is embraced by the definition of a "public utility" within the meaning of Section 201 of the Act.

(b) Significant material in the legislative history of the Act supports the interpretation placed upon Section 201 (b) by the court below. Petitioners stress portions of the Committee reports and statements made on the floor of Congress to the effect that the Act was intended to fill the gap wherein state regulatory bodies could not act because of the interstate character of the commerce concerned. Such statements can be accepted as indicative of the general purpose, and yet be entitled to no greater effect than a similar declaration of policy in a preamble of the Act. The pertinent inquiry is how Congress chose to effectuate that purpose, and what procedural tools were furnished to the administrative agency

designated to make Congress's desire operative. The Senate Report submitted by Senator Wheeler (Sen. Rep. 621, 74th Cong., 1st sess., pp. 18 and 19) indicates that it was not thought safe to rely on the vague language of a preamble for so important a matter as delimiting jurisdiction: "The limitation on the Federal Power Commission's jurisdiction in this regard has been inserted *in each section* in an effort to prevent the expansion of Federal authority over State matters." [Italics supplied.] And as already stated, certain provisions, such as Section 204 (f) relating to issuance of securities and assumption of liability, spell out the specific limitation of Federal jurisdiction in the field in which state regulation exists.

By making the definition of "public utility" turn on ownership or operation of facilities for transmission or sale of electric energy in interstate commerce, construed to include facilities of the kind here involved, Congress did not encroach on state regulatory jurisdiction as limited in *Public Utilities Commission* v. *Attleboro Steam & Electric Co.*, 273 U. S. 83. In reading the Act that limitation is controlling. Cf. *Parker* v. *Motor Boat Sales*, 314 U. S. 244; *Hartford Electric Light Company* v. *Federal Power Commission, supra.* Moreover, the regulatory provisions applicable to "public utilities" contain express provisions saving state requirements; and in any

event there is no necessary conflict between federal requirement for administrative approval and state requirement for administrative approval such as would cause the latter to be superseded.

3. The prior decisions of this Court support the conclusion that Jersey Central's facilities in question are facilities for the transmission of electric energy in interstate commerce

Petitioners contend at length that under prior decisions of this Court as to what constitutes interstate commerce, the transmission of electric energy over the facilities of Jersey Central is not transmission in such commerce.[18] They advert, curiously, to cases falling into two general categories: (1) Where a commodity which had been transported interstate was thereafter locally distributed within a state, and (2) Where after intrastate movement and prior to movement out of state, a commodity had come to a complete rest within the state of origin (whether for storage, manufacture, processing, negotiation of sale, or otherwise). In such cases, this Court had held that the local distribution, or the intrastate move-

[18] Neither the Commission nor the court below relied on the *effect* on interstate commerce of Jersey Central's facilities, or of transactions carried on by means thereof, as a reason for subjecting them to Commission jurisdiction. Both concluded that the facilities were facilities for the transmission of electric energy "in" interstate commerce. Petitioners' arguments differentiating the Act from other Federal legislation based on effect on interstate commerce are thus superfluous. Cf. *Illinois Natural Gas Co. v. Central Illinois Public Service Co.*, 314 U. S. 498, 509–510.

ment prior to such coming to rest, was not so connected with the interstate movement as to be "in" interstate commerce. The cases of this character, cited by petitioner, depend upon their own peculiar facts. Decisions of this Court involving facts more analogous to the situation herein presented, in which an opposite conclusion has been reached, are far more numerous."

The cases relied upon by petitioners are not pertinent here because the movement of the electric energy from point of origin at the generating plant in South Amboy, New Jersey, to destination in Staten Island, New York, was not interrupted or broken either at the Raritan River, the

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[17] E. g., *Kelley* v. *Rhoads*, 188 U. S. 1, 8; *Southern Pacific Terminal Co.* v. *Interstate Commerce Commission*, 219 U. S. 498, 526; *Texas & N. O. R. R. Co.* v. *Sabine Trans Co.*, 227 U. S. 111, 126, 130; *The Pipe Line Cases*, 234 U. S. 548; 560; *Western Oil Refining Co.* v. *Lipscomb*, 244 U. S. 346, 349; *Western Union Telegraph Co.* v. *Foster*, 247 U. S. 105, 113; *Pennsylvania Gas Co.* v. *Public Service Commission*, 252 U. S. 23, 31; *Eureka Pipe Line Co.* v. *Hallanan*, 257 U. S. 265, 272; *United Fuel Gas Co.* v. *Hallanan*, 257 U. S. 277, 281; *Dahnke-Walker Milling Co.* v. *Bondurant*, 257 U. S. 282; *Lemke* v. *Farmers Grain Co.*, 258 U. S. 50, 58; *Baltimore & O. S. W. R. R. Co.* v. *Settle*, 260 U. S. 166, 171; *Champlain Co.* v. *Brattleboro*, 260 U. S. 366, 376; *Spalding & Bros.* v. *Edwards*, 262 U. S. 66, 69; *Hughes Brothers Timber Co.* v. *Minnesota*, 272 U. S. 469, 474; *Carson Petroleum Co.* v. *Vial*, 279 U. S. 95, 109; *United States* v. *Erie R. Co.*, 280 U. S. 98, 102; see also *Peoples Natural Gas Co.* v. *Federal Power Commission*, 127 F. (2d) 153 (App. D. C.), certiorari denied, 316 U. S. 700; *Hartford Electric Light Company* v. *Federal Power Commission*, *supra*, note 10.

Mechanic Street substation, or at any other point in New Jersey. No such interruption in fact could occur.[18]

Petitioners seek to find a basis for a claim of such interruption in the transfer of title or custody to Public Service, in the absence of any contract between Jersey Central and Staten Island, and in the fact that Public Service might prevent the flow of electric energy from South Amboy to Staten Island by opening switches at its Mechanic Street substation or changing its physical facilities or mode of operation.[19] But this Court has held that the continuity of a movement "in" interstate commerce is not interrupted or broken by either change of custody or title (*Illinois Natural Gas Co.* v. *Central Illinois Public Service Co.*, 314 U. S. 498, 503–504, and cases there cited), or the absence of direct contractual relationship (*Western Union Telegraph Co.* v. *Foster*, 247 U. S. 105, 113; *cf. Currin* v. *Wallace*, 306 U. S. 1, 9), or the possibility of a stoppage that does not

[18] The interstate movement which the cases indicate to be necessary is a movement complete from origin to destination. Petitioners' claim that the flow of electric energy from South Amboy to Staten Island is infrequent and irregular and therefore not "continuous", is largely irrelevant, for it is unnecessary under these decisions that such flow be maintained for any specified period of time.

[19] There is no pretense that there is any storage, manufacture of processing, or any negotiation of sales by Public Service after interstate movement starts, such as was presented in the cases relied on by petitioners.

take place (*Flanagan* v. *Federal Coal Co.*, 267 U. S. 222, 225; *Eureka Pipe Line Co.* v. *Hallanan*, 257 U. S. 265, 272; *United Fuel Gas Co.* v. *Hallanan*, 257 U. S. 277, 281).

The elements are here present which, under the prior decisions of this Court, make transmission over Jersey Central's facilities a part of a continuous movement in interstate commerce. The continuity of the transmission of electric energy from the generating plant to the point of consumption, whether within the state of origin or outside thereof, is fixed by the nature of electric energy. Jersey Central's president, himself an electrical engineer, testified that the generation and consumption of electric energy are instantaneous, the amount generated being limited by the amount consumed (R. 311).[20] An increase in

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[20] It is this distinguishing characteristic of electric energy transmission which made particularly appropriate the recognition by this Court in *Public Utilities Commission* v. *Attleboro Steam & Electric Co.*, 273 U. S. 83, 89, of the applicability of the concept previously adopted with respect to natural gas that "the transportation, sale and delivery constitutes an unbroken chain, fundamentally interstate from beginning to end" in all of which "the paramount interest is not local but national, admitting of and requiring uniformity of regulation." This alone is sufficient to distinguish *Superior Oil Company* v. *Mississippi*, 280 U. S. 390 (on which petitioners rely), as shown by the opinion in that case, p. 396. That case is also distinguishable as a tax case (*Minnesota* v. *Blasius*, 290 U. S. 1, 8).

It is therefore futile for Jersey Central to attempt to shift to Public Service the responsibility for control of the flow of electric energy from South Amboy to Staten Island (Pet.

Staten Island's demand on Public Service is instantaneously supplied (until control adjustments can be made) by an increase in generation by the generators carrying Public Service's load at the time, particularly Jersey Central's South Amboy generating plant, which is electrically "nearer" to the Mechanic Street substation than other generating plants (R. 775–776, 789–790). Assuming, arguendo, the necessity for the existence of an intent upon the part of Jersey Central when transmission starts, fixing the out-of-state destination, such intent is shown by the evidence in the record. The deliberateness with which the several companies acted to bring about such flows, coupled with knowledge of the pertinent circumstances upon the part of Jersey Central, compels the conclusion that Jersey Central must have intended the necessary consequences of its participation. So far as the sale of so-called economy energy and the flow of energy for emergency use are concerned, there can be no doubt of the deliberateness of the acts of the several companies, in view of the contract arrangements for such transactions (R. 275, 355, 1039–1050, 1068–1069, 408–409). They must be deemed to have intended the other

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Br. 68, 19, 36), in view of the joint responsibility of all participating companies in providing the pathway. It could with equal plausibility be contended that neither did Public Service control the transmission, as in fact, was testified by one of the petitioners' witnesses (R. 416), and that Staten Island itself directed such transmission by creating the demand.

energy transactions which necessarily ensued, having deliberately adopted the synchronized mode of operation.[21]

Indeed, the evidence is that the operators and officials of the companies involved knew that the electric energy was bound to flow as it did (R. 558–559, 566), and did nothing to prevent such flow (R. 565). One of petitioners' expert witnesses testified that he had recognized, from look-

[21] Where electric utility systems are operated in synchronism, as are those of Jersey Central and Staten Island, with that of Public Service, delivery of electric energy is necessary in order to maintain synchronism (R. 87, 840, 850), and there is a range of amounts of electric energy which experience shows will flow back and forth (R. 565–566, 241). While such flows of energy are variously characterized as "unwanted," "inadvertent," "slopover," or "incidental," that energy is sold to customers (R. 308–311) and utilized (R. 329) as electric energy flowing under another arrangement would be, and the terminology is immaterial (see note 3, *supra*). With the facilities of these companies, such flow may be limited by manual adjustment after it is started (R. 521), but there is no way to prevent its flow (R. 287) as long as the systems are operated in synchronism, although equipment is manufactured to control and limit such flow (R. 438). Synchronized operation is, of course, necessary in order to make emergency power available as the equivalent of spinning reserve, and synchronization is maintained for that purpose even though it involves the inadvertent flow of energy back and forth (R. 362–363, 361, 396–397). The making of the necessary manual adjustments to limit such flow is a matter of secondary importance to the operator (R. 556), and such flows frequently continue for from five to twenty-five minutes (R. 557–558). At times a reverse of flow is deliberately brought about in order to strike a balance for a prior inadvertent flow (R. 413–414).

ing at meters at the Mechanic Street substation when he was there, that at that time Jersey Central energy was flowing to Staten Island (R. 573–578). In view of the particular reasons and opportunity which Jersey Central had for familiarity with the operations of Public Service (R. 331–332), it "cannot escape the impact of the Act by a transparent claim of ignorance of the interstate character" of the movement. *Cf. Warren-Bradshaw-Drilling Co.* v. *Hall et al.*, No. 21, this Term, decided November 9, 1942.

If Jersey Central finds the arrangement for synchronized operation beneficial, as obviously it does, it cannot consistently seek to derive such benefits while denying responsibility for its participation in that arrangement or contend that such participation is too insubstantial to be subject to the law.[22]

And for a transaction to be "in" interstate commerce it is not necessary that the intention or knowledge fixing the out-of-state destination

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[22] Jersey Power's contention (Pet. 29) that the quantity and character of energy flows between Jersey Central and Staten Island "indicates that the maxim *de minimis non curat lex* should apply," appears to have been abandoned in petitioners' brief (cf. Pet. Br. 22). The contention is, in any event, without weight. Jurisdiction under the commerce clause is in no wise dependent upon volume (*National Labor Relations Board* v. *Fainblatt*, 306 U. S. 601, 606; *Valvoline Oil Co.* v. *United States* 308 U. S. 141, 147) or ratio to total business (*Public Utilities Commission* v. *Attleboro Steam & Electric Co.*, 273 U. S. 83, 90).

be that of the party first having custody or title. That the first party has no concern or connection with the subsequent movement out of state is "of no consequence." *Texas & N. O. R. R. Co.* v. *Sabine Tram Co.*, 227 U. S. 111, 126; cf. *United States* v. *Rock Royal Co-operative*, 307 U. S. 533, 568–569; *Mulford* v. *Smith*, 307 U. S. 38, 47; *Currin* v. *Wallace*, 306 U. S. 1, 10; *Eureka Pipe Line Company* v. *Hallanan*, 257 U. S. 265, 272.[23]

Thus far we have considered the facilities only as facilities for the transmission of the electric energy flowing from South Amboy, New Jersey, to Staten Island, New York.[24] Considered in relation to the transmission of electric energy flowing from Staten Island to the substation at South Amboy, Jersey Central's facilities are also used

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[23] In *McCluskey* v. *Marysville & Northern Ry. Co.*, 243 U. S. 36, upon which petitioner relies as establishing that the first shipper must intend the out-of-state destination, the first shipper was also the second and only shipper. In *Arkadelphia Milling Co.* v. *St. Louis Southwestern Ry Co.*, 249 U. S. 134, and *Oregon-Washington R. & Navigation Co.* v. *Strauss & Co.*, 73 F. (2d) 912 (C. C. A. 9), certiorari denied, 294 U. S. 723, the sales which determined that some parts of the commodity would ultimately go out of state, after storage and processing, had not been made when the first movement started. *Baltimore & O. R. Co.* v. *United States*, 15 F. Supp. 674 (N. D. N. Y.), relied on by petitioners, was overruled in a subsequent case between the same parties on the same factual situation by the same court on the question of the sufficiency of the evidence of intent fixing destination at the beginning of the first movement, 24 F. Supp. 734, 735.

[24] As to such flow, no claim that the facilities are for local distribution and hence not for transmission "in" interstate commerce could be made.

for transmission of electric energy in interstate commerce. This Court in *Illinois Natural Gas Co.* v. *Central Illinois Public Service Co.*, 314 U. S. 498, under provisions of the Natural Gas Act corresponding to Section 201 (b) of the Federal Power Act, squarely held that the owner of a segment of gas transmission facilities located wholly within a state is subject to the Federal Power Commission's jurisdiction where the gas had come from out of state.

We submit, therefore, that under the controlling decisions of this Court, as well as the plain language of the Act, the transmission between South Amboy and the Raritan River, over Jersey Central's facilities, of electric energy transmitted from New Jersey and consumed in New York, and vice versa, was transmission "in" interstate commerce, and the ownership and operation of such facilities by Jersey Central were properly held to make it a "public utility" under the Act.

II

Jersey Power failed to comply with Section 203 (a) of the Act by acquiring stock of Jersey Central without first having obtained an order of the Commission authorizing it to do so

Jersey Power applied to the Board of Public Utility Commissioners in New Jersey for approval of an exchange of 341,350 shares of common stock of Jersey Central for certain other securities which it held. The Board approved the transfer

of the common stock on the books of Jersey Central (R. 7). Jersey Power acquired this stock without seeking the prior authorization of the Federal Power Commission as provided in Section 203 (a) of the Act. In addition to its contention that it did not fall within the language of the Act because Jersey Central was not a public utility as defined therein, Jersey Power also contends that Section 203 (a) of the Act does not apply to a transaction of this character because, it says, the declaration of policy set forth in section 201 (a) and the legislative history of the Act disclose that it was not intended to apply to a matter subject to state regulation. It urges that the Board of Public Utility Commissioners of New Jersey had control over a transaction of this character; that the Board exercised such jurisdiction in approving the purchase; that the assumption of jurisdiction over this transaction by the respondent conflicts with that of the state commission, a situation which the Act avowedly intended to avert. We urge that these contentions are without merit.

1. Section 203 (a) of the Act applies to the acquisition of stock here in question

Section 203 (a) forbids a public utility (which Jersey Power admittedly is) from purchasing, acquiring, or taking any security of another public utility (which we have shown Jersey Central to be) without having first obtained authorization

from the Federal Power Commission.[25] Jersey Power neither applied for nor obtained the authorization of the Commission for the acquisition of Jersey Central's stock, which it is not disputed was a security within the meaning of the Act. Accordingly it follows that Jersey Power was subject to the requirements of Section 203 (a).

2. Neither the declaration of policy in Section 201 (a) of the Act nor its legislative history requires a contrary conclusion

At an earlier point in this brief (*supra*, p. 25 *et seq.*), we have discussed the effect of the declaration of policy in Section 201 (a) and of the legislative history of the Act upon Section 201 (b), (c), and (e) in so far as it defined a "public utility." We there pointed out that declarations of policy and legislative history could not prevail over the plain and unambiguous language of the enacting clauses of the Act. For the reasons there stated we submit that the plain and unambiguous language of Section 203 (a) may likewise not be rendered nugatory by resort to the same material.

While Section 203 (a) is regulatory in character, it contains within itself provisions prescrib-

[25] While Jersey Power has not contended that it is completely immune from Commission regulation of stock acquisitions, certain arguments advanced by it, if pressed to their logical conclusion, would lead to that result. If the Federal Power Commission lacked jurisdiction over this transaction because it was subject to state regulation, it would also lack jurisdiction over any stock acquisition by Jersey Power, irrespective of the status of the electric utility whose stock it sought to acquire.

ing the extent to which deference is to be given to state regulation. In respect of the acquisition of the stock here in question there is no conflict between the Commission and the New Jersey Board.

(a) Section 203 (a) of the Act contains provisions for administrative reconciliation of possible divergent views between the Commission and state regulatory agencies. (Cf. *Hartford Electric Light Company* v. *Federal Power Commission*, *supra*, n. 10.) Section 203 (a) provides that upon application for approval of the purchase of the stock the Commission shall give reasonable notice in writing to the Governor and the state commission of each of the states in which the physical property affected, or any part thereof, is situated, and to such other persons as it may deem advisable. This obviously is for the purpose of permitting reference to a joint board for hearing or a conference as provided in Section 209 or at least of permitting the state authorities to express any views which they may entertain. So far as we are aware the Federal Power Commission has never approved the acquisition of stock or a sale or merger of facilities over the objection of a state regulatory body.[28]

[28] The Regulations of the Commission require that a petition under Section 203 (a) show whether or not an application is required to be filed with any other State or Federal authority, and, if so, the filing of a copy of the application and order relating thereto. Federal Power Commission,

That Congress wrote into Section 203 (a) the sole restriction which it intended to apply even in the face of valid state regulation is made abundantly clear by a comparison of that section with Section 204 of the Act, which regulates the issuance of securities and the assumption of contingent liabilities by "public utilities." Section 204 (f) provides that the provisions of that section shall not extend to a public utility organized and operating in a state under the laws of which its security issues are regulated by a state commission. If, as petitioners contend, the declaration of policy in Section 201 (a) precludes federal regulation of any matters subject to state regulation, Section 204 (f) is rendered superfluous, and a nullity in contravention of established rules of statutory construction. *Platt* v. *Union Pacific Railroad Co.*, 99 U. S. 48, 58–59. Section 203, regulating acquisition of securities and sale or merger of facilities, contains no such limiting provision. It appears obvious that it was considered neither desirable nor necessary.

Rules of Practice and Regulations, Part 33, Sec. 33.2, Par. O; Part 3, Sec. 33.2, Exh. K.

Petitioners (Br. 73) seek to explain away Section 204 (f) as being not an exception from the Commission regulatory power where the transaction is subject to state regulation, but a relaxation of a general limitation to that effect (which Petitioners argue Section 201 (a) to be). In the case of security issues, Petitioners say that a particular kind of state regulation is necessary to give rise to the exception, namely regulation by a state regulatory body having jurisdiction to

The significance of the omission of a provision of this character from Section 203 is emphasized by the statement in the Senate Report on the bill which became the Federal Power Act (*supra*, p. 29) that any specific limitation upon the Commission's jurisdiction, where intended, was "inserted in each section to prevent the expansion of federal authority over state matters." As to the wisdom of inserting such provision in Section 204 dealing with the issuance of securities and omitting it from Section 203 dealing with the acquisition of securities we are not here concerned.[28]

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regulate rates and charges for the sale of electric energy to consumers within the state. If this argument *in extremis* requires any answer, it may be noted that (1) this was not the intention of the National Association of Railroad and Utilities Commissioners who sponsored the amendment by which Section 204 (f) was added (p. 1681, Public Utility Holding Companies, Hearings before the House Committee on Interstate and Foreign Commerce, 74th Cong., 1st Sess., on H. R. 5423); (2) petitioners' argument reveals that their contention with respect to Section 201 (a) is that if a matter is subject to any kind of regulation by a state, all Federal Power Commission regulation thereof is dispensed with. This would mean, for example, that if state legislature prescribes standards for health and safety, or fire prevention, or regulates terms or conditions of employment, or imposes any other police regulation with respect to a particular transaction, regulation by the Federal Power Commission is withheld; (3) petitioners' explanation fails to explain why it was provided in Section 204 (f) that the "public utility" must be one "organized *and* operating in a State under the laws of which its security issues are regulated by a State commission". Cf. *Hartford Electric Light Company* v. *Federal Power Commission*, *supra*, note 10.

[28] Section 204 (f) was adopted *in toto* from the revision

(b) There is no conflict between Section 203 (a) and the New Jersey regulation.

(i) It is clear that Section 203 (a) of the Act operates upon the purchasing utility only and does not attempt to control either the vendor or the utility whose stock is acquired. The New Jersey statute (N. J. Stat. Ann. 48:3–10 (infra, p. 52)) on the contrary operates upon the vendor of stock, and provides that one public utility may not sell or permit a transfer to be made upon its books of any of its stock to another public utility unless authorized to do so by the New Jersey Board of Public Utility Commissioners.[29] Thus the fed-

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suggested by the National Association of Railroad and Utilities Commissioners. It appeared as Section 206 (g). It is significant to note that the Association made no similar suggestion with respect to Section 203, which appeared in the Association's revision as Section 205. Hearing before the House Committee on Interstate and Foreign Commerce, 74th Cong., 1st Sess. (H. R. 5423), p. 1663.

[29] It will be noted that in the preliminary parts of petitioners' brief the statement occurs frequently that the New Jersey Board has jurisdiction over Jersey Power's *acquisition* of stock in question. (e. g. Pet. Br. 28, 55, 77). But when petitioners argue the point on the basis of the language of the New Jersey statute they speak only (Pet. Br. 76, 80) of the *transfer* (i. e. on the books of Jersey Central) or the *transfer and sale* (i. e. transfer on the books of Jersey Central and sale by a "public utility incorporated under the laws of" New Jersey). Reference to the provisions of the New Jersey statute printed as Appendix A to Brief for Petitioners, particularly to Title 48, Chapter 3, Section 10, printed, p. A30, will show that there is no requirement for Board approval with respect to the purchaser's acquisition, which is the only thing with which the order under review deals.

eral statute forbids the unauthorized purchase while the state statute forbids the unauthorized sale. The two statutes are accordingly complementary rather than overlapping.

(ii) Both the federal and state statutes confer administrative power to permit, not to compel, the transaction. That is to say, permission must be obtained from both commissions before the transfer can take place but no power is conferred upon either body to compel the acquisition or the sale of stock. Accordingly we do not have a situation where one body may direct something to be done and the other body may forbid it.

(iii) Finally, it is to be observed that the Federal Power Commission has taken no stand upon the question of the acquisition of the stock of Jersey Central by Jersey Power. It has merely found that Jersey Power has violated Section 203 (a) by acquiring the stock of Jersey Central without having obtained permission so to do from the Commission. It may well be that if the question were properly presented to it, the Federal Power Commission would grant its approval of the acquisition. Certainly if such acquisition is in the public interest, as the transfer was found by the state commission to be, it is difficult to believe that permission would be refused. In any event it will be time enough to consider these questions if and when a divergence arises. As the court below

appropriately remarked (R. 1134): "No conflict is shown upon the present record and none *may ever come into existence.*" (Italics supplied).[2]

It is accordingly submitted that under the plain and unambiguous language of Section 203 (b) Jersey Power was required to obtain the permission of the Federal Power Commission for the acquisition of the stock of Jersey Central; that there is nothing in Section 201 (a) or in the legislative history of the Act which renders Section 203 (a) inapplicable to the instant case; and that no invasion of the regulatory power of New Jersey has here occurred.

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[2] The interest of the Commission in scrutinizing the proposed acquisition of stock by one public utility in another is plain. Such acquisition may accomplish the same result as a merger or consolidation, which are also entrusted to the jurisdiction of the Commission under Section 203 (a). One "public utility" acquiring control over another may intend to use such control to alter the existing transmission facilities and their physical interconnections, in a manner which may impair the adequacy of service to interstate customers or adversely affect the rates charged them. The Commission's power to examine and withhold approval from such an acquisition in advance, would prevent the prejudice to the public interest and the disadvantage to all parties concerned which might follow from postponing until the transaction is completed, Commission action to remove the impediments to adequate interstate service. Approval of the transaction by a state commission alone will not meet these objections, for the local body may not consider, or even have jurisdiction to consider, the effect of the transaction upon interstate or out-of-state utilities and consumers, or other interests safeguarded by the Federal Power Act.

CONCLUSION

For the reasons stated, it is respectfully submitted that the decision below is correct and should be affirmed.

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APPENDIX

The Federal Power Act of 1935, 49 Stat. 847 (16 U. S. C. sec. 824) provides in part as follows:

SECTION 201. (a) It is hereby declared that the business of transmitting and selling electric energy for ultimate distribution to the public is affected with a public interest, and that Federal regulation of matters relating to generation to the extent provided in this Part and the Part next following and of that part of such business which consists of the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce is necessary to the public interest, such Federal regulation, however, to extend only to those matters which are not subject to regulation by the States.

(b) The provisions of this Part shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce, but shall not apply to any other sale of electric energy or deprive a State or State commission of its lawful authority now exercised over the exportation of hydroelectric energy which is transmitted across a State line. The Commission shall have jurisdiction over all facilities for such transmission or sale of electric energy, but shall not have jurisdiction, except as specifically provided in this Part and the Part next following, over facilities used for the generation of

electric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce, or over facilities for the transmission of electric energy consumed wholly by the transmitter.

(c) For the purpose of this Part, electric energy shall be held to be transmitted in interstate commerce if transmitted from a State and consumed at any point outside thereof; but only insofar as such transmission takes place within the United States.

(d) The term "sale of electric energy at wholesale" when used in this Part means a sale of electric energy to any person for resale.

(e) The term "public utility" when used in this Part or in the Part next following means any person who owns or operates facilities subject to the jurisdiction of the Commission under this Part.

(f) No provision in this Part shall apply to, or be deemed to include, the United States, a State or any political subdivision of a State, or any agency, authority, or instrumentality of any one or more of the foregoing, or any corporation which is wholly owned, directly or indirectly, by any one or more of the foregoing, or any officer, agent, or employee of any of the foregoing acting as such in the course of his official duty, unless such provision makes specific reference thereto.

* * * * * *

SEC. 203. (a) No public utility shall sell, lease, or otherwise dispose of the whole of its facilities subject to the jurisdiction of the Commission, or any part thereof of a value in excess of $50,000, or by any means whatsoever, directly or indirectly, merge or con-

solidate such facilities or any part thereof with those of any other person, or purchase, acquire, or take any security of any other public utility, without first having secured an order of the Commission authorizing it to do so. Upon application for such approval the Commission shall give reasonable notice in writing to the Governor and State commission of each of the States in which the physical property affected, or any part thereof, is situated, and to such other persons as it may deem advisable. After notice and opportunity for hearing, if the Commission finds that the proposed disposition, consolidation, acquisition, or control will be consistent with the public interest, it shall approve the same.

* * * * *

SEC. 204. (a) No public utility shall issue any security, or assume any obligation or liability as guarantor, indorser, surety, or otherwise in respect of any security of another person, unless and until, and then only to the extent that, upon application by the public utility, the Commission by order authorizes such issue or assumption of liability. The Commission shall make such order only if it finds that such issue or assumption (a) is for some lawful object, within the corporate purposes of the applicant and compatible with the public interest, which is necessary or appropriate for or consistent with the proper performance by the applicant of service as a public utility and which will not impair its ability to perform that service, and (b) is reasonably necessary or appropriate for such purposes. The provisions of this section shall be effective six months after this Part takes effect.

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(f) The provisions of this section shall not extend to a public utility organized and operating in a State under the laws of which its security issues are regulated by a State commission.

* * * * *

SEC. 209. (b) The Commission may confer with any State commission regarding the relationship between rate structures, costs, accounts, charges, practices, classifications, and regulations of public utilities subject to the jurisdiction of such State commission and of the Commission; and the Commission is authorized, under such rules and regulations as it shall prescribe, to hold joint hearings with any State commission in connection with any matter with respect to which the Commission is authorized to act. The Commission is authorized in the administration of this Act to avail itself of such cooperation, services, records, and facilities as may be afforded by any State commission.

* * * * *

SEC. 301. (a) Every licensee and public utility shall make, keep, and preserve for such periods, such accounts, records of cost-accounting procedures, correspondence, memoranda, papers, books, and other records as the Commission may by rules and regulations prescribe as necessary or appropriate for purposes of the administration of this Act, including accounts, records, and memoranda of the generation, transmission, distribution, delivery, or sale of electric energy, the furnishing of services or facilities in connection therewith, and receipts and expenditures with respect to any of the foregoing: *Provided, however,* That nothing in this Act shall relieve any public utility from keeping any accounts, memoranda, or records which

such public utility may be required to keep by or under authority of the laws of any State. The Commission may prescribe a system of accounts to be kept by licensees and public utilities and may classify such licensees and public utilities and prescribe a system of accounts for each class. The Commission, after notice and opportunity for hearing, may determine by order the accounts in which particular outlays and receipts shall be entered, charged, or credited. The burden of proof to justify every accounting entry questioned by the Commission shall be on the person making, authorizing, or requiring such entry, and the Commission may suspend a charge or credit pending submission of satisfactory proof in support thereof.

NEW JERSEY STATUTE

Section 19 of the Act of April 21, 1911, as amended by the Act of March 5, 1935 (N. J. Stat. Ann. 48:3–10) provides as follows:

19. No public utility as herein defined incorporated under the laws of this State shall sell, nor shall any such public utility make or permit to be made upon its books any transfer of any share or shares of its capital stock, to any other public utility as herein defined, unless authorized to do so by the board. Nor shall any public utility as herein defined incorporated under the laws of this State sell any share or shares of its capital stock or make or permit any transfer thereof to be made upon its books, to any corporation, domestic or foreign, or any person, the result of which sale or transfer in itself or in connection with other previous sales or transfers shall be to vest in such corporation or person a majority in interest of the out-

standing capital stock of such public utility corporation unless authorized to do so by the board. Every assignment, transfer, contract or agreement for assignment or transfer, by or through any person or corporation to any corporation or person in violation of any of the provisions hereof shall be void and of no effect, and no such transfer shall be made on the books of any public utility corporation. Nothing herein contained shall be construed to prevent the holding of stock heretofore lawfully acquired.

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